



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**FAMILY DIVISION**  
**CIVIL APPEAL NO. 74 OF 2015**

**B W M.....APPELLANT/MOTHER/APPLICANT**

**VERSUS**

**S K K J.....RESPONDENT**

**R U L I N G**

1. The Appellant/Applicant, B W M approached the High Court by way of Memorandum of Appeal dated 22<sup>nd</sup> June 2015 and filed in court on 23<sup>rd</sup> July 2015. With the Appeal the Applicant filed an interim application brought by way of Notice of Motion dated 22<sup>nd</sup> July 2015; under a slew of statutory provisions as set out here below:

**Rule 20 and 21 of the Children (Practice and Procedure, Parental Responsibility) Regulations [2002], Sections 4,5,9, 13, 23(3) 25, 81, 82, 83, 84, 85, 86, 88 and 114 of the Children Act of 2001, Order 40 Rules 1,2 and 3 and Order 51 of the Civil Procedure Rules [2010] and Sections 1A and 1B, 3 and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya, The Constitution of Kenya 2010 & all other enabling Provisions of the law)**

2. In the Notice of Motion which was filed under certificate of urgency the following 18 (eighteen) reliefs are sought:

**prayers**

1

2 spent

3

4 were granted on interim basis

8

5.

6. that the court do suspend, discharge and/or quash the orders given in Nairobi **Children’s** court case No. 801 of 2015 B W M vs S K J by Ms. Nyoike, Senior Resident Magistrate on 6<sup>th</sup> July 2015 and reinstate the orders given therein by Ms. Gichana and Mr. Kuto on 18<sup>th</sup> June 2015, 24<sup>th</sup>

June, 2015 and 3<sup>rd</sup> July, 2015 respectively, pending the hearing and determination of this application.

7. That the court makes a Wardship Order in respect of baby L I J, male born on 7<sup>th</sup> June 2014 and aged one (1) year, pending the hearing and determination of this application.
9. That the Respondent by himself, his servant and/or agents and/or anybody else acting under him be restricted by way of injunction from interfering with the Applicant's actual custody, care and control of the minor child pending the hearing and determination of this application .
10. That the court do restrain the Respondent/Father from interfering with, insulting, intimidating, harassing, threatening, verbally and physically abusing the Appellant/Mother and the minor child namely L I J pending the hearing and determination of the this application.
11. That the court do grant legal and actual custody, care and control of the said minor child to the Appellant/Mother.
12. The Applicant also prayed that all the aforesaid orders be granted pending the hearing and determination of the application.
3. The application is premised on grounds that the Appeal emanates from a lower court suit in which the subject matter is **custody** of a minor child of very tender years – Baby L I J male child aged 1(one) year, said to have been kept away from his mother the Applicant, by the Respondent despite the fact that he is still breastfeeding.
4. That the Applicant filed the lower court suit seeking orders inter alia for immediate production of the minor child in court and interim custody, care and control of the minor child and when the matter came before the duty court, the magistrate did, in the first instance, issue an order on the orders sought. That the Respondent withdrew and relocated the minor child from his abode with the Applicant to an unknown destination with little or no communication, necessitating the orders for production of the minor child.
5. It is also alleged that the duty court gave the production Order in the best interest of the minor who was in dire need of medical vaccination/immunization. That the Respondent, despite being served and being aware of the Production Order, failed to produce the minor child in court and as such the court proceeded to *inter lia* issue Summons to the Respondent for his personal appearance in court and further rescue orders in favour of the minor child and upon rescue to be placed in the immediate interim custody of the Applicant. The Respondent was ably represented at the time by his counsel.
6. That the Respondent adamantly and in total disregard of the Court Orders and summons to appear failed, refused and/or neglected to appear in court on the date mandated for such appearance and further failed to disclose the whereabouts of the minor child and, frustrating the rescue efforts.
7. That upon application by the Applicant and after due consideration of the circumstances, the court issued a warrant of arrest against the Respondent.
8. That thereafter, ex-parte and without any notice to the Applicant and/or her Advocates, Ms. Nyoike, Senior Resident Magistrate, in the above stated suit, on 6<sup>th</sup> July 2015 gave orders holding in abeyance all previous orders in the file as stated herein above. Her orders in essence halted the rescue and production of the minor child in court, the interim custody granted to the Appellant/Applicant and unconditionally set aside warrant of arrest issued against the Respondent for disobedience of court orders.
9. That the Applicant is aggrieved and dissatisfied with part of the Orders given by Ms. Nyoike, Senior Resident Magistrate, on 6<sup>th</sup> July 2015, and has preferred this appeal.

10. That the Appellant has reliably learnt from third parties that the Respondent is not living with the minor child and has abdicated and abandoned care of the child to a female relative who is a stranger to the child.
11. That since the withdrawal of the baby from her custody the Applicant has with the assistance of her family, made frantic efforts to locate and trace the child including several calls and visits to the Respondent at his office for the return of the minor child, all in vain for the Respondent has adamantly failed, refused and/or neglected to return the baby with the sole intention to punish and teach the Applicant a lesson.
12. That the general welfare for the child is gravely and genuinely prejudiced by the Respondent's unpredictable, irresponsible, immature, inconsistent, cruel and offensive conduct and the child is in need of protection and care.
13. That the appellant is reasonably apprehensive that the minor child will face cruelty and hardship, in the hands of the unknown female relative of the Respondent who has custody of the minor child and it is in the best interest of the child for the Applicant to remain with the actual custody, care and control of the minor child, due to his tender age.
14. That the Respondent is a busy politician with a vast business network and as such, is incapable of giving the minor child the attention he deserves. That he is not aware of the minor child's medical history, and the baby has missed his vaccination and is due for another any time soon.
15. That the Appeal raises serious issues of law and fact, is arguable with high chances of success and unless the orders sought are granted, it will be rendered nugatory.
16. That it is in the best interest of the minor child to grant the orders sought.
17. The application is supported by the affidavit of B W M the Appellant/Applicant and mother of the infant, sworn on 22<sup>nd</sup> July 2015, and the averments in the affidavit mirror the grounds of the Application.
18. The Application is opposed by the Respondent's Replying affidavit sworn on 11<sup>th</sup> August 2015. In the said Replying affidavit the Respondent deposed that he did not take the minor away from the Applicant, but instead the Applicant abandoned the minor in his office. That on 15<sup>th</sup> May 2015 the Applicant brought the naked infant to the Respondent's office and caused commotion, entering every office screaming and yelling looking for the Respondent when she was informed that the Respondent was not in. When she did not find the Respondent, she abandoned the minor in the washroom and fled.
19. The Respondent argued that if the Applicant was genuinely concerned about the minor's welfare and well being, she would not have waited a month to file a matter before the Children's court seeking custody. That she went to the Children's court with unclean hands and did not fully disclose the material facts as to how the Respondent acquired custody of the minor.
20. The Respondent contended that after the Applicant abandoned the naked minor in the washroom at his offices, his secretary bought the minor clothes and since the Respondent was out of town he called his sixth wife to go to his office and take the minor to hospital and later on to a place of safety. That since then the Applicant did not bother to know where the minor was and/or what had happened to him after abandonment.
21. The Respondent further averred that after he was served with the orders by the Children's court, he instructed his advocate to challenge the said orders in the Judicial Review court which ordered him to appear in court on 7<sup>th</sup> July 2015. Before he appeared in court, the Applicant proceeded to apply for a warrant of Arrest in the Children's Court and it was granted on 2<sup>nd</sup> July 2015, without

the court having the benefit of hearing his side of the story.

22. That the Children's Court upheld the principle of the best interest of the child, by granting the Respondent custody of the minor rather than the Applicant, who, the Respondent refers to as suicidal and a person who endangered the minor's life. That the Applicant's actions are criminal and as such he reported the matter at the Police Station.
23. The Respondent deponed that he had informed the Applicant that he was ready to take custody of the minor because, according to Luhya custom, children belong to the father and especially where the mother of the child is not married to him.
24. Both Miss Njuguna learned counsel appearing for the Applicant and Mr. Omari learned counsel appearing for the Respondent, gave oral submissions in which they reiterated at length the averments in the affidavits of their respective clients. It appeared as if they were already ventilating the Appeal itself.
25. In a nutshell M/s. Njuguna submitted that the Applicant has an arguable appeal with high chances of success, as it raises serious issues of fact and law. That the appeal will be rendered nugatory should the orders sought not be granted and that the balance of convenience weighs heavily on temporary custody being with the mother. M/s. Njuguna exhorted the court to take cognizance of the universal principle of law which dictates that custody of a child of tender years is the right of a mother.
26. M/s Njuguna also contended that the assertions in the Replying affidavit having not been proved, were baseless and could not be relied upon to deny the Applicant custody of the child. That since the disappearance of the child the Applicant and her relatives had made frantic efforts to secure the return of the child, hence the lapse of the three weeks before she filed the matter in court. She submitted that the Applicant took the child to his father for bonding and visitation, since the father remained noncommittal since the birth of the child.
27. M/s Njuguna also argued that the child was still on breast milk when he was taken away by the Respondent and it is not true that he was malnourished and depressed as averred by the Respondent. That in any case no medical report was furnished to that effect.
28. M/s Njuguna went on to urge that the Respondent has disregarded all court orders issued in the lower court and therefore has no respect for court orders. Further that the decision of Hon. Nyoike Senior Resident Magistrate, amounts to sitting on appeal on the decisions of fellow magistrates Hon. Gichana and Hon. Kuto. She relied on the following authorities to bolster her client's case.
  1. **HCCC Appeal No. 176 of 2010 at Kisumu**
  2. **HCC Appeal No. 40 of 2014 at Nakuru**
  3. **Civil Appeal No. 30 of 1978 [1979]**
  4. **HC Civil Appeal No. 15 of 2008 at Meru**
  5. **HCC Appeal No. 21 of 2009 at Busia**
  6. **JR No. 335 and 356 of 2012**
29. On the other hand, Mr. Omari contended for the Respondent that since conception, the Applicant's conduct leaned towards terminating the life of the minor. That the Respondent dissuaded her and convinced her that if she was unable to care for the child he would take him in and care for him as he was doing ten other children abandoned with him by their various mothers. Mr. Omari submitted that the Applicant had made ten other unsuccessful attempts to leave the baby with the Respondent previously, and that her act of abandoning the child in the washrooms despite pleas from more than one hundred employees in the premises indicated a mental, or psychological problem on the part of the Applicant. (who counted the employees?).
30. Counsel contended that the Applicant's actions amounted to abandonment, since his client was not

in the office when the child was left there. He urged that if the visit was for bonding purposes, the Respondent being a wealthy man, would have made better arrangements. That in any case he did not desire to have custody of the child, or to continue with the relationship with the Applicant. Mr. Omari opined that the psychiatric report produced by the Applicant as proof of her sound mental status had been doctored and could not be relied upon.

31. Mr. Omari submitted that it is no longer the law that **children of tender years be placed in the custody of their mothers**, but that the law today is about the **best interest of the child**. That it cannot be in the best interest of the child in this case to be placed under the custody of a mother who abandoned him in a washroom.
32. Mr. Omari submitted further that the so called negotiations between the parties that lasted three weeks, were a bid to compel the Respondent to marry the Applicant, something he is not willing to do, and were never about getting Baby L I J back with his mother. That the filing of the matter in the lower court was only meant to forestall criminal charges being brought against the Applicant.
33. Mr. Omari exhorted the court to take into account the customs of the Luhya Community to which the Respondent belongs, which dictates that a child belongs to the father, and grant custody to the father so that the child is not discriminated upon as he grows up. Counsel relied on the following provisions of the law to bolster his client's case: **section 4920 & 3, section 83(1)(a),(f),(i), 55, 56, 56(2), section 13, section 18, section 119, section 76(1), section 127(1)(a) & (b)** all of the **Children's Act**. Counsel also relied on **Article 53** of the **Constitution**.
34. After careful consideration of the pleadings and the rival submissions of the counsels on record, the court will confine itself at this juncture to determining who between the two parents should have temporary custody of Baby L I J, pending the hearing and determination of the Appeal. There being no dispute that the two parties are the biological parents of baby L I J and that he is aged just above one year, the issue for determination is whether there exists disentitling factors, for the mother to have custody of the child given his tender age.
35. On the issue of whether or not to grant a stay of the lower court's orders pending Appeal, the provisions of the law are very clear and couched in mandatory terms on when the court may grant stay orders. The Court shall not issue any stay orders unless the two grounds set out in sub-rules (a) and (b) of Order 42 Rule 6(2) are satisfied. The pertinent sub rule in this case is 6(2)(a) which provides that:

**“No order for stay of execution shall be made under sub rule (1) unless – (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay:”**

The court finds that the Applicant has satisfied the second limb set out in sub-rule (a) of Order 42 Rule 6(2), as the application was made without undue delay from the time the lower court orders were issued.

36. On the second limb of substantial loss, the decisions which lend themselves to the circumstances of this case are to be found in the cases of **Adah Nyabok -vs- Uganda Holding Properties Limited (2012)**, in which Mwera J (as he then was) stated that:

**“Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal”** and of **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001**, in which **Musinga, J** (as he then was) explained substantial loss in the following terms:

**‘...substantial loss’ is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.’**

37. In the circumstances of this case it is Baby L I J and not the two protagonists who stands to suffer loss since we are not dealing with a material claim. **Article 53(2)** of the **Constitution** provides the guiding principle on this question as follows:

**“A child’s best interests are of paramount importance in every matter concerning the child.”**

The other pertinent law is the **Children Act No. 8 of 2001** and in particular **Section 4** thereof, which provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law or any other institutions, the paramount consideration shall be the best interest of the child.

38. M/s Njuguna invoked the principle that a child of tender years should be placed in the custody of the mother, while Mr. Omari invoked the law on the best interest of the child. I find that these two are not mutually exclusive and in my view, the best interest of a child aged one year is to be placed in the custody of the biological mother, unless there are exceptional circumstances disentitling her of such custody.

39. What amounts to the best interest of the child has not been defined by the law. This may be because the best interest of a child will depend on the particular circumstances of each child. The definition of a child of tender years is however, provided under **Section 2** of the **Children Act** as follows:

**“a child of tender years” means a child under the age of ten years.”**

The courts in Kenya have accepted that custody of children of tender years ought to be with the mother, unless there are compelling reasons for the child to be removed from the mother and given to the father. -See the decision of Kimaru J in **HCC Appeal No. 21 of 2009, M. A. VS R.O.O.** These compelling reasons or exceptional circumstances must however be proved to court.

40. According to the Respondent the compelling reasons are that the Applicant had behaved in a manner to suggest that she was psychologically impaired and may harm the baby. Further that the child was malnourished and depressed and in dire need of medical attention which he is now receiving from “top notch pediatricians.” The Psychological instability, attributed to the Applicant and the malnutrition and depression attributed to Baby L.I.J are all serious but known medical conditions, which cannot be thrown at the court willy nilly as it were, with no medical evidence as proof thereof.

41. The court notes that the Applicant has had possession, care and control of the child from birth till the 15<sup>th</sup> May 2015 when they were separated. The Respondent’s explanation is that she abandoned the child. Her explanation is that she took the child for bonding and visitation with his father and stepped out to buy a supply of diapers for him and medication for herself. She returned to find the offices locked and the Respondent gone, baby and all.

42. Baby L I J is not only aged just above one year it was submitted that he was still breast feeding and had also not completed his immunization programme when he was separated from his mother. It was further submitted that he has since missed a clinic visit for his immunization since the Applicant still retains the immunization card and the Respondent is unaware of his needs.

43. In the premise it is worth repeating that it is the child’s best interest and not the interests or wishes of the parents that is paramount. This court therefore holds that it is in the best interest of Baby L I J for the Applicant to have temporary custody of the child and for the Respondent to continue to provide for him as he did there before, pending the hearing and determination of the Appeal filed herein.

It is so ordered.

**SIGNED DATED and DELIVERED** in open court this **18<sup>th</sup>** day of **September 2015**.

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**L. A. ACHODE**

**JUDGE**